HIGH COURT OF UTTARANCHAL AT NAINITAL

A.O. No. 323 of 2004

The National Insurance Company ..... Appellant

Versus

Smt. Usha Devi & others ..... Respondents

A.O. No. 322of 2004

The National Insurance Company ..... Appellant

Versus

Smt. Meera Devi & others ..... Respondents

A.O. No. 321 of 2004

The National Insurance Company ..... Appellant

Versus

Smt. Murti Devi & others ..... Respondents

A.O. No. 320 of 2004

The National Insurance Company ..... Appellant

Versus

Smt. Meera & others ..... Respondents

Dated: October 15, 2004

Hon. Rajesh Tandon J.

Present appeal has been filed against the judgment and award dated 24.5.2004 passed by the Motor Accident Claims Tribunal, Haridwar.

Briefly stated the facts giving rise to the present appeal are that the respondents have filed separate claims petitions before the Motor Accident Claims Tribunal, Haridwar. The Claim Petition No. 108 of 2003 has been filed for grant of compensation on account of death of Sri Aman Kumar. Claim petition No. 113 of 2003 has been filed by Smt. Murti & others on account of death of Sri Asha Ram. Claim Petition No. 109 of 2003 has been filed by Smt. Meera for the grant of compensation of account of death of Sri Mangey Ram and Claim Petition no. 110 of 2003 has been filed on account of death of Sri Satpal. All the deceased were going to Bangad Rajasthan form Nanheda by Tata Summo Hr 02H/4375. As soon as the vehicle reached near village Sahpur Kirana, District Panipat, Hariyana, it met with accident and collided with a tree. The petitioners alleged that the accident took place due to rash and negligent driving by the driver of the vehicle namely Sri Shyambir Singh. All the passengers boarded in the vehicle have sustained injuries and Sri Satpal, Mangey Ram, Harish, Amankumar and Asha Ram succumbed to the injuries instantaneously.

The opposite parties have contested the claim petitions and filed their respective written statements.

Opposite party no.1 Shyambir Singh in his written statement has stated that the accident had not taken place due to rash and negligent driving. The answering opposite party tried his best to control the vehicle but it collided with a tree. The vehicle was insured with opposite party the National Insurance company who is liable to pay the compensation, if any. Opposite party no.2 owner of the vehicle has made similar statement in his written statement.

Opposite party no.3 the National Insurance Company has contested the petitions and has alleged that the driver of the vehicle had no valid driving licence and the owner of the vehicle has no valid permit, registration certified and the vehicle was over-loaded at the time of accident. The driver and the owner of the vehicle have violated the terms and conditions of the insurance policy and as such the insurance company is not liable to pay compensation to the petitioners.

On the pleadings of the parties the Claims Tribunal has framed as many as four issues.

In reply of issues no.1 and 2 it was held that the accident had taken place due to rash and negligent driving by opposite party no.1 Shyambir Singh and not due mechanical failure of the vehicle. Issue no.3 has been framed with regard to the violation of the terms and conditions of insurance policy. This issue has not been pressed by the counsel for the insurance company and as such the issue was decided against the insurance company.

The claims Tribunal on the basis of ocular testimony of witnesses of the accident has given categorical findings that the accident took place due to rash and negligent driving of the truck driver. The opposite party no.1 driver of the vehicle has stated in his written statement that the accident took place due to unavoidable circumstances as he lost control over the vehicle, he tried his best to avoid the accident but the jeep collided with a tree.

The petitioners to prove this issue has examined Vinod Kumar as P.W.2 who is the eye witness of the accident. He has categorically stated that the driver of the vehicle was driving the vehicle rashly and negligently. The passengers warned the driver so many time but he continued to drive the vehicle with a high speed. As against this the opposite parties have examined Sri Shyambir Singh driver as D.W.1 and Sri Prem Singh as D.W.2 Sri Shyambir Singh has stated that one unknown truck had hit his vehicle from behind due to which accident took place. The first information report of the accident was lodged on the same day after one hour of the accident in the Police Station and in that report the cause of accident has been mentioned as rash and negligent driving. D.W.1 Shyambir Singh has admitted in his cross examination that at the time of accident there was raining and he was driving the vehicle at a speed of 55 to 60 kms. He has first time stated about a truck who hit the vehicle from behind in the Claims Tribunal is him examination in-chief and prior to that there is no whisper of such cause of accident which shows that the driver of the vehicle has concocted different stories at the different times.

The driver of the truck was the best witness to depose the cause of accident but surprisingly enough his statement

regarding cause of accident is self contradictory and no reliance can be placed on it.

The Apex Court in the case Syad Akbar vs. State of Karnataka, Air 1979 SC 1848 has held as under:

"It is to such cases that the maxim res ipsa liquitur may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. To emphasise the point, it may be reiterated that in such cases, the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due case. But , according to some decisions, satisfaction of this condition alone is not sufficient for res ipsa to come into play and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for the second requirement is that where the defendant has control of the thing, which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred. * * * * * *

Thus for the application of the maxim res ipsa loquitur no less important a requirement is that the res must not only bespeak negligence, but pin it on the defendant."

Thus in view of aforesaid principle of law the Claims Tribunal was perfectly justified by holding that the accident took place due to the rash and negligent driving of the jeep driver.

Keeping in view the age and income of the deceased the amount of compensation assessed by the Claim Tribunal is proper and justified. In all the claim petition no evidence regarding the income of the deceased persons has been adduced

and the Claims Tribunal has presumed the income of all the deceased personal as Rs.15,000/- per annum, as per norm fixed in the Schedule II of the Motor Vehicles Act. The Claims Tribunal has applied multiplier according to the age of the deceased persons and beside this has awarded a sum of Rs.2,000/- for funeral expenses and Rs.5,000/- for loss of consortium. Thus the Claims Tribunal has awarded a sum of Rs.1,57,000/- in M.A.C. No.110 of 2003, Rs. 1,67,000/- in M.A.C. No. 109 of 2003, Rs.82,000/- in M.A.C. No. 113 of 2003 and Rs.1,02,000/- in M.A.C. No. 108 of 2003. The Claims Tribunal has calculated the amount of award after assuming rational income of Rs.15,000/- and used multiplier as per Schedule prescribed under the Motor Vehicles Act, and there is no scope for any interference in the amount of award in the appeal.

The learned counsel for the appellant has vehemently argued before this Court that at the time of accident the vehicle was overloaded and there were 14 to 15 passengers while the Jeep was insured for nine plus one passenger. The burden to prove that the vehicle was overloaded is in the shoulders of the insurance company and if the insurer has become success to prove so, even then the insurance company is liable to discharge the third party liability and to pay compensation to the passengers travelling by the vehicle.

The Apex Court in the case of United India Insurance Co. vs. Lehru, 2003(2) AWC 1601 has held as under:

17. *It is submitted that Kamla case5 is not correctly decided. It is submitted that sub-section (7) of Section 149 of the Motor Vehicles Act, 1988 has not been notices by this Court in Kamla*

case5. We see no substance in this submission. A plain reading of Section 149 would show that an insurance company would continue to be liable to third persons. Section 149 read as follows:

> *"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third-party risks.–(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under cause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*
>
> *(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an*

appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely–

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely–

(i) a condition excluding the use of the vehicle–

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without sidecar being attached where the vehicle is a motorcycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who had been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a

representative of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer [being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country] shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-station (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of

sub-section (2) shall, as respect such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expressions 'material fact' and 'material particular' means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to be benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section

(2) or in the corresponding law of the reciprocating country, as the case may be."

(emphasis supplied)

Thus under sub-section (1) the insurance company must pay to the person entitled to the benefit of the decree, notwithstanding that it has become "entitled to avoid or cancel or may have avoided or cancelled the policy". The words "subject to the provisions of this section" mean that the insurance company can get out of the liability only on grounds set out in Section 149. Sub-section (7), which has been relied on, does not state anything more or give any higher right to the insurance company. In the contrary, the wording of sub-section (7) viz. "no insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability" indicates that the legislature wanted to clearly indicate that insurance companies must pay unless they are absolved of liability on a ground specified in sub-section (2). This is further clear from sub-section (4) which mandates that conditions, in the insurance policy, which purport to restrict insurance would be of no effect if they are not of the nature specified in sub-section (2). The proviso to sub-section (4) is very illustrative. It shows that the insurance company has to pay to third parties but it may recover from the person who was primarily liable to pay. The liability of the insurance company to pay is further emphasized by sub-section (5). This also shows that the insurance company must first pay, then it can recover. If Section 149 is read as a whole it is clear that sub-section (7) is not giving any additional right to the insurance company. On the contrary it is emphasizing that the

insurance company cannot avoid liability except on the limited grounds set out in sub-section (2).

18. *Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held inn Skandia[2] and Sohan Lal Passi3 cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of he person killed in an accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third-party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in the aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed.*

The insurance company must establish that the breach was on the part of the insured."

The Apex Court in the case National Insurance Co. Ltd. vs. Swaran Singh and others (2004) 3 SCC 297, has held as under:

110. *The summary of our findings to the various issues as raised in these petitions is as follows:*

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) As insurer is entitled to raise as defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the

matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not

fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been

compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

The claims Tribunal has already mentioned in its judgment that the Insurance Company shall pay the amount of award to the claimants and is free to recover the same from the owner of the vehicle.

Insurance laws are the social laws for providing shelter to the family of the deceased person. The litigation remain pending for so many years. The Apex Court, therefore, has resolved the controversy, that the insurance company has no

right to challenge the quantum of compensation unless permission has been sought on the specified grounds.

The time has come when the insurance companies should come forward for the help of the families who had been the victim of the accidents. The failure of the insurance company results in miscarriage of justice. The insurance company should stand as caretaker of the insured and should not contest the case for defending the purpose for which they exist.

I am just quoting the words from the mouth of Lord Krishna to the following effect:

;LekU;kf}tr% ykdk ykdkU;kftr% p ;%A
g"kke"kkHk;ks}xSeqDr;k ;% lpe% fi;%AA

He was is not a source of annoyance to his fellow creatures, and who is his turn does not feel vexed with his fellow-creatures, and who is free from delight and envy, perturbation and fear, is dear to Me.

In view of the aforesaid fact, the appeals have no force and are hereby dismissed. However, liberty is given to the appellant insurance company to recover the amount of award from the insured by filing an application before the Claims Tribunal, which shall be decided by the Claims Tribunal on its own merits.

No order as to costs.

(Rajesh Tandon J.)

October 15, 2004
*Dhyani